

IN THE WATER TRIBUNAL HEARING

HELD IN PRETORIA

REF: WT 27/02/2009

In the application for condonation between:

MARTIENS LANDGOED (PTY) LTD

APPLICANT

and

DEPARTMENT OF WATER AFFAIRS

FIRST RESPONDENT

CHIEF DIRECTOR: WATER USE

SECOND RESPONDENT

CONDONATION RULING: 22 JUNE 2009

APPEARANCES:

Coram : Mr L J Lekale (Chairperson)
Mr H Thompson (Member)
Mr A S Makhanya (Member)

For the Applicant : Adv Johann de Necker

For the Respondents : Mr Teffo Mashala

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1. This is a unanimous ruling in the application for condonation heard on 26 May 2009 in Pretoria;
- 1.2. The Applicant was represented by **Adv Johann de Necker** and the instructing attorney was Messrs Piet van Dyk Attorneys from Komatipoort;
- 1.3. The Respondents were represented by **Mr Teffo Mashala** from the Directorate Legal Services in the National Office of the Respondent.

2. ISSUES TO BE DECIDED:

- 2.1. The question to be answered by the Water Tribunal was whether there is a good reason to grant condonation for the late lodging of an appeal by Martiens Landgoed (Pty) Ltd against a directive issued by the Regional Director of the Mpumalanga Regional Office of the Department of Water Affairs and Forestry (DWAF), as it was then known, dated 3 November 2008; and
- 2.2. In the event that the Tribunal is satisfied that there is such a good reason, the Tribunal was requested to grant such condonation.

3. BACKGROUND TO THE ISSUE:

- 3.1. Officials of DWAF conducted a site visit on Portion 61 of the Farm Ten Bosch 162 JU and according to them found that Martiens Landgoed Pty Ltd is altering the bed, banks, course or characteristics of a water course without the necessary authorisation in terms of section 22(1) of the National Water Act, 36 of 1998 (NWA).
- 3.2. The Regional Director of the Mpumalanga Regional Office of DWAF then issued a directive to Martiens Landgoed Pty Ltd dated 3 November 2008 directing Martiens Landgoed to submit within five working days, after receipt of the directive, any authorisation to prove the legality of the water uses.
- 3.3. In the event that the requested authorisations were not received within the five working days, Martiens Landgoed was further directed to take action to prevent the possible forming of erosion and the deterioration of the water quality. A Rehabilitation and Environmental Management plan for the removal of the dams were to be submitted for approval by DWAF within 30 days after receipt by the applicant of the directive.
- 3.4. Martiens Landgoed Pty Ltd appealed against this directive to the Water Tribunal and the appeal notice was lodged with the Registrar of the Tribunal on 28 January 2009.
- 3.5. According to section 148(3)(b) of the NWA and rule 4(1)(b) of the Water Tribunal Rules (Rules) an appeal must commence within 30 days after notice of the decision was sent to the appellant. Therefore the lodging of the appeal was some 56 days late.
- 3.6. The Applicant applied in terms of rule 4 of the Rules to the Water Tribunal for the condonation of the late lodging of the appeal.

4. SURVEY OF EVIDENCE AND ARGUMENTS:

Evidence and documents submitted

- 4.1. No oral evidence was adduced. The Applicant and Respondents made oral submissions through their respective representatives.
- 4.2. The Applicant submitted sworn affidavits from **Dirk Wouter Hurter, Douw Anton Hurter, Thomas Ignatius Potgieter Smit and Anna Elizabeth Solomon Engelbrecht** to the Tribunal at the start of the hearing and used these in support of the application.
- 4.3. The Respondents wrote a letter to the Registrar dated 21 May 2009 stating that they will not oppose the application for condonation.
- 4.4. The bundle from the Registrar of the Water Tribunal also forms part of the evidence and arguments analysed by the Tribunal.

Contents of the documents submitted by the Appellant and also argued

- 4.5. Both Dirk Wouter Hurter and Anna Elizabeth Solomon Engelbrecht tried to contact the relevant official of DWAF, Mr D van der Boon, to discuss the directive with him after it was delivered to the Applicant. After numerous phone calls, Ms Engelbrecht eventually contacted Mr van der Boon on the 11th November 2008, and at that time the five working day period fixed for submission of the necessary authorisation to prove the legality of the water uses had already lapsed.
- 4.6. Ms Engelbrecht explained to Mr van der Boon that, according to Dirk Wouter Hurter, Martiens Landgoed Pty Ltd has an existing lawful water use and that all their affairs as far as the water uses are concerned are legal and completely in order.
- 4.7. Mr van der Boon informed Ms Engelbrecht that the matter is nothing serious and not of an urgent nature at all, and, further, that the directive should not be interpreted literally. Mr van der Boon also informed her that he would sort out the problem as soon as convenient and that the Applicant should not be very concerned about it.
- 4.8. On the 24th November 2008 the so-called “Blue Scorpions” entered the farm with many people and the media and destroyed the water works. Ms Engelbrecht again tried unsuccessfully to contact Mr van der Boon.
- 4.9. After this incident the Applicant decided to seek legal advice and tried to contact Advocate Maritza Uys, a water and resources law specialist in the vicinity of Komatipoort, but she was then already on leave and would only have been available on 12 January 2009.
- 4.10. As soon as Advocate Uys was back at office Martiens Landgoed Pty Ltd contacted her. She then lodged an appeal dated 29 January 2009.
- 4.11. According to the Applicant it has good prospects of success on appeal, as it has done absolutely nothing wrong and that the First and Second Respondents acted on wrong information. Martiens Landgoed Pty Ltd has an existing lawful water use and all its affairs as far as the water uses are concerned are legal and completely in order. The Respondents did not comment on this.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS:

- 5.1. The following factors should be addressed in determining whether there is a good reason to grant condonation for the late lodging of an appeal, namely: The degree of lateness; the reasonableness of the explanation for the delay; the prospects of success in the dispute concerned; and whether there is prejudice to the other parties to the matter.
- 5.2. The fact that the Respondents do not oppose the application does not relieve the Applicant of the onus of showing to the Tribunal that there exists a good reason to grant condonation. The Applicant must still submit facts and evidence to the

Tribunal regarding the relevant factors, except for the factor of prejudice to the Respondents. Thereafter the Tribunal must still apply its mind to the matter.

- 5.3. The Tribunal is satisfied from the affidavits of Dirk Wouter Hurter and Anna Elizabeth Solomon Engelbrecht, which were not disputed by the Respondents, that there exists a reasonable explanation for the 56 days lateness in lodging the appeal.
- 5.4. It seems to the Tribunal that Martiens Landgoed Pty Ltd at no time was negligent and/or willful in not complying with the prescribed time limits. It was due to circumstances beyond its control that the appeal was lodged late. Before 24 November 2008 they contacted Mr van der Boon who informed them not to be concerned about the directive and that it will be sorted out as soon as possible. After 24 November 2008 they could only contact their legal representative on 12 January 2009 who submitted the appeal on 29 January 2009, some 17 days after they contacted her.
- 5.5. From the evidence the applicant appears to have reasonable prospects of success on appeal.
- 5.6. Therefore the Tribunal is satisfied that there exists a good reason to grant condonation for the late lodging of an appeal by Martiens Landgoed (Pty) Ltd against a directive issued by the Regional Director of the Mpumalanga Regional Office of the DWAF.

6. **DECISION:**

- 6.1. In the result, the Tribunal grants condonation for the late lodging of an appeal by Martiens Landgoed (Pty) Ltd against a directive issued by the Regional Director of the Mpumalanga Regional Office of the DWAF dated 3 November 2008.
- 6.2. The Registrar of the Tribunal shall schedule the necessary hearing for this appeal and notify the parties concerned accordingly.



H. Thompson